Antonopoulos, Incorporated d/b/a Roger's of Santa Clara and Hotel, Motel and Restaurant Employees and Bartenders Union, Local 19, Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO. Case 32-CA-2947

April 28, 1982

### **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On July 10, 1981, Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Antonopoulos, Incorporated d/b/a Roger's of Santa Clara, Santa Clara, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to recognize and, upon request, bargain with Hotel, Motel and Restaurant Employees and Bartenders Union, Local 19, Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All cooks, waiters, waitresses, cocktail waitresses, bartenders, dishwashers, buspersons and cashiers employed by the Employer at its Santa Clara, California facility excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT solicit our employees to sign a petition stating that they no longer desire to be represented by the above-named labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make our employees whole for any losses they may have incurred as a consequence of our refusing to recognize the abovenamed labor organization on and after May 29, 1980, together with interest thereon as required by law.

Antonopoulos, Incorporated D/B/A Roger's of Santa Clara

<sup>&</sup>lt;sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products. Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>&</sup>lt;sup>2</sup> In adopting the Administrative Law Judge's finding that the Respondent unlawfully solicited the employees and thereafter withdrew recognition of the Union in violation of Sec. 8(a)(1) and (5), Member Fanning finds the facts herein distinguishable from those in *Hydro Conduit Corporation*, 254 NLRB 433 (1981). The record in the instant case, unlike *Hydro Conduit*, shows that Esther Bays is a supervisor; that Bays solicited employees to sign the petition which sought the removal of the Union as collective-bargaining representative while acting on behalf of management rather than while acting in concert with other employees; that a representative of management personally solicited an employee to sign the disputed petiton; and there was no evidence that the employees had expressed dissatisfaction with the representation they received from the Union

In accordance with his partial dissent in Olympic Medical Corporation, 250 NLRB 146 (1980), Member Jenkins would award interest on any backpay due based on the formula set forth therein.

### **DECISION**

#### STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: This matter was heard by me at Oakland, California, on March 3, 1981. The case is based upon a charge filed by Hotel, Motel and Restaurant Employees and Bartenders Union, Local 19, Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO (Union), and a complaint issued on behalf of the General Counsel alleging that Antonopoulos, Incorporated d/b/a Roger's of Santa Clara (Respondent) violated Section 8(a)(1) and (5) of the Act by withdrawing and withholding recognition of the Union and by soliciting employees to sign a petition seeking the removal of the Union as the employee collective-bargaining representative. The Respondent's answer denies the commission of the alleged unfair labor practice. <sup>2</sup>

On the basis of the record made at the hearing, my observation of the demeanor of the witnesses while testifying, and my careful consideration of the briefs filed on behalf of the General Counsel and the Respondent, I make the following:

#### FINDINGS OF FACT

#### I. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Preliminary Findings

The Respondent operates a restaurant in Santa Clara, California, known as Roger's of Santa Clara. The restaurant has been in existence for 11 years and is situated at a location designed to attract customers from the nearby computer-related enterprises. Anargyros Antonopoulos is the president and the general manager of the restaurant.4 He is assisted in managing the restaurant by his son-in-law, Lambros Panauotopoulos. In addition, Antonopoulos' wife assists with bookkeeping duties on a part-time basis. One of the central figures in the events described below is Esther Bays, who has been the head waitress for the entire period the restaurant has been in existence. In the 19 years preceding the opening of Roger's of Santa Clara, Antonopoulos owned and operated four different restaurants in the downtown San Jose, California, area, and Bays was employed by Antonopoulos throughtout most—if not all—of this period.

The interior of the restaurant facility is divided into a coffee shop (with three food counters) which can accommodate approximately 175 persons, a cocktail lounge which can accommodate approximately 50 persons and a

<sup>1</sup> The charge was filed on August 7, 1980. The complaint was issued by the Regional Director for Region 32 on September 29, 1980.

dining room which can accommodate about 65 persons. The remainder of the restaurant (about 1,800 square feet) consists of the kitchen area and a small office utilized by Antonopoulos. In addition, Antonopoulos maintains another small office in an adjacent building where he spends a very small portion of his workday.

From its inception until May 30, 1980, the Respondent recognized and maintained a collective-bargaining agreement with the Union.<sup>5</sup> By its terms, the most recent collective-bargaining agreement was in effect from June 1, 1977, until June 1, 1980. It is admitted that the appropriate unit covered by the collective-bargaining agreement includes all cooks, waiters, waitresses, cocktail waitresses, bartenders, dishwashers, buspersons and cashiers, but excludes all office clerical employees, guards and supervisors as defined in the Act.<sup>6</sup> At times material hereto, the Respondent employed approximately 26 employees in positions included in the appropriate unit, including Bays. Bays testified that she had been a union member since approximately 1947 or 1948.

### B. The Basis for the Withdrawal of Recognition

The complaint alleges and the answer admits that "on or about May 30, 1980, the Respondent withdrew its recognition of the Union . . . and since that date . . . has failed and refused to recognize and bargain with the Union." Proffered as a legal justification for this admitted conduct is the fact that on or about May 29 Bays and another waitress, Shirly Souza, approached Antonopoulos at his office and delivered a petition to him signed by 15 unit employees. The body of the petition (which is in Bays' handwriting) reads as follows:

### To Mr. Rogers:

We the undersigned do no longer wish to be represented by Local #19.

It is undisputed that Bays was the principal solicitor of the signatures on the petition. The Respondent claims that because Antonopoulos believed the petition to represent the true desires of his employees, he has—since receiving the petition—declined to recognize and deal with the Union as the representative of the Respondent's employees. In this regard, the following testimony was elicited from Antonopoulos by his counsel:

### Q. Were you surprised to receive the petition?

<sup>&</sup>lt;sup>2</sup> The Respondent's answer is dated October 14, 1980.

<sup>&</sup>lt;sup>a</sup> The complaint alleges and the answer admits that the Respondent is a California corporation engaged in the operation of a public restaurant selling food and beverages. The answer further admits the allegations in the complaint demonstrating that the Respondent's annual gross sales are sufficient to meet the Board's discretionary standard for asserting jurisdiction over retail enterprises. Finally, the answer admits that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and I so find. I further find that it would effectuate the policies of the Act to assert jurisdiction in the instant dispute.

<sup>&</sup>lt;sup>4</sup> Antonopoulos is known generally as "Roger" or "Mr. Roger."

<sup>&</sup>lt;sup>5</sup> The answer admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act, and I so find.

<sup>&</sup>lt;sup>6</sup> The admitted unit allegation in the complaint makes no mention of the position of head waitress. The collective-bargaining agreement in evidence here appears to be a standard agreement which encompasses a number of classifications of employees not employed at the Respondent's restaurant. Nonetheless, the classification of head waitress is included in the unit described in the collective-bargaining agreement. As discussed more fully below, this factor is central to the issues to be resolved in this case.

<sup>&</sup>lt;sup>7</sup> There is evidence that after the petition was presented to Antonopoulos, one additional employee approached him and requested to sign the petition. The reported testimony concerning this fact erroneously makes reference to this addition as "my mother's signature." That reference is hereby corrected, sua sponte, to read "one other signature."

- A. I was surprised. I was surprised at the names—some of the names on the petition.
- Q. What did Esther and Shirly tell you when they presented the petition to you?
- A. Well, Esther came first into the office and says, "Mr. Roger, I'm waiting for Shirly. We have something to give you." I was doing some work. My office is in the next building. We have one office in the restaurant and one in the next building, so I proceeded doing whatever I was doing and then Shirly comes, and then Esther says, "We'd like to give you this," and I looked and I wouldn't say I was surprised, but I was surprised to see a lot of the names here. It represents workers for many, many years and I accepted it and I called you. I thanked them and that was the end of it.
- Q. When you received that petition, did you believe that petition represented the sentiment of the employees whose names appear on it?
- A. Yes, I did, in view of all the things that was going on previously.
- Q. And what were all the things that were going on previously?
- A. Well, the satisfaction of the people and the threats by one of the union visit agents. I felt I was the sentiment of the people at one point.
- Q. Prior to receiving the petition, had you received any information about employees and their sentiment for or against the union?
- A. No. You can tell, though. When you're in a place where you have people working for many years, a lot of them work for many years, you feel it because they talked but I try to stay away from any talk they had among themselves. I never tried to interfere, and several times when some of the people asked me what's going to happen, I tell them to go down to the union to find out what's going on.
- Q. Had any of the employees talked to you about the union prior to your receiving that petition?
  - A. No.
- Q. Prior to receiving the petition, had you given anyone any instructions about—regarding the subject of a petition?
  - A. Never, and I underline that, never.

Bays denied that she discussed the petition with Antonopoulos before circulating it among the employees.

Contending that Bays' status was at least that of a statutory supervisor, the General Counsel alleged in the complaint that her solicitation of employee support for the petition violated Section 8(a)(1). In addition, the General Counsel alleges that the Respondent independently violated Section 8(a)(1) of the Act by Antonopoulos' conduct in soliciting employee Joel Andrade to sign the petition. The General Counsel relies heavily on Andrade's testimony to demonstrate that the Respondent encouraged, ratified, or authorized the solicitation of employees to reject the Union. According to Andrade's version of the events leading to his signing of the petition, he was passing by an area in the restaurant referred to as "the cove" sometime in late April when Antonopoulos called him saying, "Son, come here." No one else was present at that time. When Andrade complied, Antonopoulos showed him a paper and said, "You go sign this paper for me." Andrade, a Spanish-speaking person who speaks and is able to read very little English, looked at the paper and was able to recognize only the words "Local 19" on the paper. At that time the paper appeared to have about three signatures on it, "more or less." After Andrade looked briefly at the proffered paper, Antonopoulos told him, "Esther will give this paper to you to sign." Andrade then left to clean some tables and returned to the cove after about 20 minutes, when Bays was present. Andrade approached Bays and said, "Mr. Roger told me that I am going to sign a paper." At that point, Bays handed Andrade the petition saying, "It's right here, sign." Andrade testified that Bays did not explain to him the purpose of the paper, but he nevertheless proceeded to sign the petition. According to Andrade, another waitress, Shirly Souza, was present but Souza said nothing.

As noted above, Antonopoulos vehemently denied speaking to Andrade or anyone else about the petition before he received it and asserted that he had no knowledge of the petition until it was delivered to him by Bays. Antonopoulos claimed that he only spoke to Andrade on a couple of occasions while the latter was employed at the restaurant and both of those occasions concerned a bible Andrade carried.<sup>8</sup>

Bays' version of the events surrounding the solicitation of Andrade's signature differs markedly from that of Andrade. According to Bays, at the time that Andrade signed the petition, he asked her to explain the document to him. Bays told Andrade it was a petition stating that the employees did not want to be represented by the Union. Bays also asserted that she explained the petition to Andrade in Spanish as best she could and told Andrade, "Joel, I'm not forcing you. I'm not telling you to sign this thing. It's entirely up to you. You do what you think is right." Bays said Andrade simply said, "Oh, sure," and proceeded to sign the petition. Bays made no mention that anyone else was present.

Shirly Souza, who was still employed at the restaurant at the time of the hearing, testified that she had spoken to Andrade about the petition in the dining room in an effort to explain it to him. Subsequently, Souza claims to have accompanied Bays to the cove area to speak with Andrade about it in order to make sure that Andrade understood the purpose of the petition as some unspecified persons had remarked to her that he would not understand what he was signing. Nevertheless, Souza aaserted that Andrade was anxious to sign the petition after asking if he would have to pay union dues and it was explained to him that there would be no union dues to pay when the Union no longer represented the employees.

<sup>&</sup>lt;sup>a</sup> Andrade was employed by the Respondent as a busboy from October 1979 until August 1980, when he was discharged allegedly for missing work. The evidence here demonstrates that Andrade performed the usual range of duties normally associated with that position, including assisting the waitresses in making preparations to serve customers and cleaning up after them.

<sup>&</sup>lt;sup>9</sup> Bays made no reference in her testimony to a discussion of union dues.

According to Souza, both Bays and herself attempted to explain the petition to Andrade.

Apart from the situation involving Andrade, Bays had little recollection of the solicitation of the other signatures. According to Bays, in the period preceding her circulation of the petition she had been absent from work for several weeks following a foot operation. Accordingly, she went to the restaurant in her "civilian clothes" to solicit signatures on the petition. Bays recalled that Souza was in the restaurant when she solicited her signature but she could recall little else in connection with seeking Souza's acquiescence in the petition. In addition, Bays acknowledged that Anthony Marouda, a dishwasher who speaks very little English, signed the petition but Bays could not recall how she explained the petition to Marouda. 10

Joan Wesson, who worked as a waitress for Roger's of Santa Clara for 10 years before she quit her employment in August 1980, testified that she had discussed the petition with Souza before she was approached by Bays to sign it. Consequently, when Bays did approach Wesson, she told Bays that she did not want to even see the petition. According to Wesson, there were other individuals who were present at this time and a conversation was going on back and forth among those present. In Wesson's presence, Bays commented to one of the other individuals that "she liked her job." Wesson, who perceived that remark to be a threat, asked Bays, "Are you implying that I don't like my job?" According to Wesson, Bays responded only by saying, "I'm just telling you, Joanie, I like my job," and proceeded to cross her hands. Wesson testified that this made her angry and she walked away. Bays did not testify concerning this particular incident nor did Bays otherwise explain her motive in circulating the petition. 11

Apart from the foregoing, there is no other evidence with respect to the circumstances surrounding the solicitation of the petition.

### C. Bays' Supervisory Status

As noted above, Esther Bays has worked in an Antonopoulos restaurant for the past 28 or 29 years. She has been the head waitress at Roger's of Santa Clara for 11 years and was still so employed at the time of the hearing. 12 In this capacity, Bays is in charge of the waitresses, cocktail waitresses, bus persons, and cashiers. According to Antonopoulos, as a result of their long work

association and in her capacity as head waitress, Bays knew what he wanted and, as a consequence, if problems arose among the waitresses and cocktail waitresses, Bays handled the matters. However, Antonopoulos denied that Bays had ever hired any employee without consulting him first as to the specific employee to be hired. This testimony was disputed by Norma Feuerbacher and Joan Wesson. Both of these individuals testified that at the time of their initial employment they were interviewed by Bays and that Bays informed them to report to work without leaving their presence at any time during the interview or in any other fashion seeking the acquiescence of any other individual before hiring them. Although Bays initially conformed her testimony to that of Antonopoulos, when she was called as a witness for the Respondent she admitted hiring Feuerbacher and Wesson without seeking prior approval of Antonopoulos. In describing her authority in this regard, Bays testified:

A. He tells me many times, whether he's given me authority—you define it. "You need a girl. I need a girl. If you feel that this girl is right, use your judgment." I used my judgment on Norma. I used my judgment on Joanie. I look at them through the eyes of Roger. I don't look like Roger, but I think you can't work for a man for 28 years. It's like being married to a person and you know their ways, and I just took it as part of the things you do.

Antonopoulos likewise alluded to the close relationship which had developed over the years between Bays and himself in noting that Bays calls him at home many times. When Antonopoulos was asked what Bays calls him about, he responded:

Anything. Anything she has in her mind she will call me at home. If she's got a sick girl and she replaced them, or somebody told her that she's quitting, she will call me and tell me for many things. You know, a person works for 29 years, is very close to you.

In addition to herself, Feuerbacher named four other individuals whose interviews and hiring by Bays she had personally overheard. Apart from the foregoing, there is no serious testimony to dispute that which shows that Bays is responsible for obtaining replacements for employees who were going to be absent, that she takes care of arranging the vacation schedule, that she is the individual to whom the waitresses go for time off, and that on occasion she directs certain of the waitresses to work overtime. There is other testimony that Bays clears checks written by unknown customers and has, on occasion, authorized adjustments in the meal tabs for dissatisfied customers. Moreover, Feuerbacher testified that Bays had informed her she had discharged a number of employees. In summary, Wesson testified that Bays "reigned" over the waitresses and cocktail waitresses.

### D. Additional Findings and Conclusions

In Cartwright Hardware Co., Inc., 229 NLRB 781 (1977), enfd. as modified 600 F.2d 268 (10th Cir. 1979),

<sup>&</sup>lt;sup>10</sup> According to Bays, she "most likely" had Marouda's nephew, who also works at the restaurant, explain the petition to Marouda. It appears that Marouda is fluent in Greek and that his nephew is fluent in both English and Greek.

English and Greek.

11 Apart from Antonopoulos' passing reference to a threat by a union agent which was not further explained, there is no indication in this record as to the cause of the employee dissatisfaction with the Union. However, at or about this same time, a similar petition was circulated at other Santa Clara area restaurants. See Burger Pits, Inc., and Self Serv Food Corp., Inc., JD-(SF)-137-81 (1981).

<sup>&</sup>lt;sup>13</sup> In this respect, Antonopoulos testified that Bays was made the head waitress at the time the restaurant first opened and after consulting with the Union about the duties of a head waitress. According to Antonopoulos, he was told by the union official to "play it by ear." As the agreement did not say anything about the duties, Antonopoulos' instructions to Bays "... just came out of my head . . . ."

the Board summarized the general legal premise applicable herein in the following manner:

. . . It is well settled that the existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.<sup>2</sup> Following expiration of the contract, as here, the presumption continues and, though rebuttable, it is sufficient to establish, prima facie, a continuing obligation on the part of the employer to bargain with the union.3 Following expiration of a collective-bargaining agreement, therefore, an employer violates Section 8(a)(5) and (1) by repudiating its collectivebargaining relationship with the union unless it can show a reasonably based doubt as to the continuing majority support for its employees' representative.

Here, the Respondent's "reasonably based doubt as to the continuing majority support for its employees' representative" is grounded solely upon the petition solicited by Bays and presented to Antonopoulos on or about May 29. The petition will suffice to justify the Respondent's withdrawal of recognition if it is concluded that Bays—a unit member and a union member—is: (1) not a supervisor; or, (2) even if she is a supervisor, the evidence demonstrates that she was acting in concert with her fellow employees, and not as a representative of management; or (3) there is no evidence that the management encouraged, authorized, or ratified Bays' actions or led employees to believe that she was acting for management. Hydro Conduit Corporation, 254 NLRB 433 (1980), and the cases cited therein at fn. 1.

The Respondent, contrary to the General Counsel, contends that Bays is not a supervisor and, even if she is so found, there is no credible evidence that in soliciting employees to sign the petition Bays was acting on behalf of management, or that the management in any way encouraged, authorized, or ratified her actions, or led employees to believe that Bays was acting on behalf of management. In its brief, the Respondent also asserted that the General Counsel failed in his burden to demonstrate that the Union represented a majority of the Respondent's employees. Although it is true that the General Counsel did not attempt to establish the Union's majority standing among the Respondent's employees independent of the legally presumed majority alluded to in the Cartwright case, no such showing is necessary if the

General Counsel prevails as to his contentions concerning the petition.

I am satisfied that Esther Bays is a supervisor within the meaning of Section 2(11) of the Act. In this respect, the evidence is overwhelming that Bays possesses authority which she has exercised on numerous occasions to hire employees in circumstances which show that she exercises her own independent judgment. Similarly, Bays is clearly responsible for assuring that there are an adequate number of employees on the job and is otherwise responsible for the direction of the waitresses, cocktail waitresses, buspersons, and cashiers. The Respondent's contention that Bays' authority in these areas is merely routine is simply not supported by the record. On the contrary, the record here demonstrates that significant authority has been vested in Bays because her judgment is valued by Antonopoulos and she has demonstrated over the years that she could be trusted to carry out his desires without having to be instructed in minute detail as to what those desires were. Accordingly, I find that Bays is a supervisor within the meaning of Section 2(11) of the Act.

When the extent of Bays' authority is considered together with her long-term employment and her affinity and attachment to Antonopoulos, it becomes increasingly difficult to perceive how her unit membership and union membership would cause employees to interpret her antiunion statements and actions as being other than management inspired. Her dual role which resulted from her inclusion in the unit and her union membership has all of the indicia of a historical accident and it is obvious that her first loyalty is to her role as a head waitress. It is unmistakable that insofar as the waitresses and the others she supervised were concerned, Bays stood as the alter ego of Antonopoulos. To the extent that any employee may have been left in doubt as a result of the day in and day out appearances, it is most likely that her threatening innuendo about "liking her job" would remove any doubt that may have lingered as to whether or not the force of management authority was behind the petition. 13 For these reasons, I find that in soliciting employees to sign the disputed petition, the evidence demonstrates that Bays was acting on behalf of management and not in concert with other employees. 14. Accordingly, I find Bays' conduct in this regard violated Section 8(a)(1) of the Act, as alleged.

Even if it is assumed that Bays was not acting on behalf of the Respondent's management as found above, the alleged exchange between Andrade and Antonopoulos—if it occurred—demonstrates that Antonopoulos personally knew of and authorized the circulation of the pe-

<sup>&</sup>lt;sup>2</sup> Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members, 213 NLRB 651, 652 (1974), citing Shamrock Dairy, Inc., et al., 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

<sup>&</sup>lt;sup>3</sup> Bartenders Association of Pocatello, supra; Barrington Plaza and Tragniew, Inc., 185 NLRB 962, 963 (1970), enforcement denied on other grounds sub nom. N.L.R.B. v. Tragniew, Inc. and Consolidated Hotels of California, 470 F.2d 669 (C.A. 9, 1972); Terrell Machine Company, 173 NLRB 1480, 1480-81 (1969), enfd. 427 F.2d 1088, 1090 (C.A. 4, 1970), cert. denied 398 U.S. 929 (1970).

<sup>&</sup>lt;sup>4</sup> United States Gypsum Company, 221 NLRB 530, 537 (1975); Salina Concrete Products, Inc., 218 NLRB 496, 498 (1975); Cantor Bros., Inc., 203 NLRB 774, 778 (1973).

<sup>&</sup>lt;sup>13</sup> Arguably, the "like my job" remark which Wesson testified about is ambiguous. However, the Respondent chose not to rebut Wesson's testimony either as to the remark or the perception of it as threatening. Hence, it would be sheer speculation on my part to impute some other motive. Although the General Counsel did not allege this statement as a separate violation and elected at the hearing to rely on the remark solely as evidence of animus, I find the remark peculiarly inconsistent (where used by a supervisor perceived by some employees to have authority to discharge) with a finding that the supervisor was "acting in concert with other employees"."

<sup>14</sup> But see Times-Herald, Inc., 253 NLRB 524 (1980).

tition. Undoubtedly, both Andrade and Antonopoulos have a basis for bias in their testimony—Andrade felt he had been unjustly terminated by the Respondent and Antonopoulos has a self-interest in not having to deal with the Union. Notwithstanding, I find that Andrade's version of the events which transpired in connection with his signing of the petition to more nearly approximate the truth. 15 The most charitable thing that could be said concerning Antonopoulos' testimony about Bays' supervisory authority is that it was far less than candid. Moreover. Antonopoulos' testimony that he was unaware of the petition prior to its presentation to him is most doubtful where, as here, Bays returned to the restaurant from several weeks of convalescence and went throughout the restaurant in her "civilian clothes" to solicit employees to sign the petition. When these facts are considered together with the significant disparity which exists in the testimony of Bays and Souza concerning the manner in which Andrade's support for the petition was allegedly obtained, I am convinced that the scenario presented by the testimony of the Respondent's witnesses in this regard is not credible. Moreover, Andrade's assertion that Bays presented the petition curtly and told him to sign it more closely comports with what likely happened between a dominant supervisor and an inarticulate busboy. Accordingly, I credit Andrade's version of the events which led to his signing of the petition in all respects except as to his initial approximation of when these events occurred. In this circumstance, I find that Antonopoulos personally solicited Andrade to sign the petition which was being circulated by Bays and, by such conduct, the Respondent violated Section 8(a)(1) of the Act, as alleged.

As the foregoing findings demonstrate that the petition was circulated by Bays on behalf of management and that Antonopoulos personally knew of and authorized its circulation, I find the petition to be tainted. By withdrawing and withholding recognition solely on the basis of the tainted petition, I further find that the Respondent violated Section 8(a)(1) and (5) of the Act, as alleged.

## II. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent found to exist in section I, above, occurring in connection with the Respondent's operations described therein, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### III. THE REMEDY

Having concluded that the Respondent has violated the Act in the manner specified above, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to remedy such violations.

Affirmatively, it is recommended that the Respondent be required to recognize and bargain with the Union as the exclusive bargaining representative of its employees. In addition, it is recommended that the Respondent be required to maintain in effect the terms and conditions of employment specified in the now-expired collective-bargaining agreement unless and until the Respondent and the Union agree otherwise, or until the parties bargain to a legitimate impasse. To the extent that the Respondent may have changed the terms and conditions of employment in effect under the old agreement to the economic detriment of employees, it is my recommendation that the Respondent be required to make whole the employees for any losses they suffered as a consequence of its withdrawal of recognition. 16 Likewise, the Respondent shall be required to make whole any trust funds provided for under the collective-bargaining agreement. In the event any backpay is due, the computation of backpay herein shall be in the manner provided by the Board in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest thereon as provided by the Board in Olympic Medical Corporation, 250 NLRB 146 (1980), and Florida Steel Corporation, 231 NLRB 651 (1977). And see, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). To the extent that it may be determined in the compliance stage of this proceeding that the Respondent must reimburse any trust fund in order to fully make its employees whole for their losses, interest on such amounts shall be determined in accordance with the Board's discussion of that question in Pullman Building Company, 251 NLRB 1048 (1980), and the cases cited therein. It is also recommended that the Respondent be ordered to post the attached notice to employees at its restaurant in Santa Clara, California, and thereafter notify the Regional Director for Region 32 of the steps that it has taken to comply with the recommended Order entered hereafter.

### CONCLUSIONS OF LAW

- 1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. At all times material herein the Union has been designated as the exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All cooks, waiters, waitresses, cocktail waitresses, bartenders, dishwashers, buspersons and cashiers employed by the Respondent at its Santa Clara, California, facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

<sup>&</sup>lt;sup>18</sup> In so concluding, I find the arguments as to Andrade's lack of credibility which are grounded upon his testimony as to the approximate date his signature was solicited and his command of the English language to be unpersuasive.

<sup>&</sup>lt;sup>16</sup> Nothing herein should be construed to require the Respondent to alter any economic benefit granted to employees since May 29, 1980, in the absence of a request by the Union that the Respondent do so.

- 4. By withdrawing and withholding recognition of the Union as the exclusive representative of its employees in the unit specified in paragraph 3 above, the Respondent has refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.
- 5. By the action of Anargyros Antonopoulos and Esther Bays in soliciting employees to sign the petition being circulated at the Respondent's restaurant on or about May 26, 1980, the Respondent has interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

Pursuant to Section 10(c) of the Act and upon the foregoing findings of fact, conclusions of law, and the entire record herein, I hereby issue the following recommended:

#### ORDER 17

The Respondent, Antonopoulos, Incorporated, d/b/a Roger's of Santa Clara, Santa Clara, California, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Refusing to recognize and, upon request, bargain with Hotel, Motel and Restaurant Employees and Bartenders Union, Local 19, Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the unit described as follows:

All cooks, waiters, waitresses, cocktail waitresses, bartenders, dishwashers, buspersons and cashiers employed by the Respondent at its Santa Clara, California, facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Soliciting its employees to execute a petition stating that they no longer desire to be represented by Hotel, Motel and Restaurant Employees and Bartenders

- Union, Local 19, Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.
- 2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:
- (a) Recognize and bargain with the Union as the exclusive representative of the employees in the unit described in paragraph 1(a) above.
- (b) Make the employees in the unit described above whole for any losses they may have suffered as a consequence of the Respondent's withdrawing and withholding recognition of the Hotel, Motel and Restaurant Employees and Bartenders Union, Local 19, Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO, as their exclusive collective-bargaining representative in the manner specified in the section above entitled "The Remedy."
- (c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.
- (d) Post at its restaurant in Santa Clara, California, copies of the attached notice marked "Appendix." <sup>18</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by its representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.
- (e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

<sup>&</sup>lt;sup>17</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>18</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."